Supreme Court, U.S.
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No. 98-1120

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

J.D. ABRAMS, INC.,

Cross-Petitioner,

vs.

WILLIAM L. MILLER,

Cross-Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CROSS-RESPONDENT'S BRIEF IN OPPOSITION

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The Cross-Respondent, William L. Miller ("Miller"), respectfully requests that the Court deny the conditional cross-petition for a writ of certiorari filed by the Cross-Petitioner, J.D. Abrams, Inc. ("Abrams"), seeking review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this case on September 24, 1998, and reported at 156 F.3d 598.

STATEMENT OF THE CASE

Abrams, a successful Texas highway and road contractor, employed Miller from June 1985 until February 28, 1994, when Miller left his position as vice president and director at Abrams to become manager and chief operations officer of Balfour Beatty Construction, Inc. ("Balfour Beatty") in its highway division. As an officer and director of Abrams, Miller was privy to proprietary information and trade secrets. Balfour Beatty recruited Miller to start its highway division in Texas. During a series of meetings concerning his prospective employment, Miller disclosed proprietary information and trade secrets of Abrams to agents of Balfour Beatty.

On April 18, 1994, Abrams filed suit in a Texas state court against Miller and Balfour Beatty. The case was tried to a jury in November of 1995. The jury found that Miller misappropriated proprietary information or made an improper use of the trade secrets of Abrams and awarded Abrams damages of $1 million. The jury also decided that Miller had not breached any fiduciary duties owed to Abrams and that punitive damages were not appropriate because Miller did not act with "malice mean[ing] ill will, evil motive, or flagrant disregard for the rights of others."

Miller filed a voluntary chapter 7 bankruptcy petition seeking protection from the state court judgment. Abrams

initiated an adversary proceeding seeking an exception to discharge under 11 U.S.C. §§ 523(a)(4) and 523(a)(6). Based on the doctrine of collateral estoppel, the United States Bankruptcy Court for the Western District of Texas, Austin Division ("Bankruptcy Court"), granted summary judgment in favor of Abrams holding that the state court judgment was a nondischargeable debt under § 523(a)(4). The Bankruptcy Court, exercising its jurisdiction under 28 U.S.C. §§ 157 and 1334, denied the parties' competing motions for summary judgment under § 523(a)(6). Miller and Abrams both appealed. The District Court affirmed holding that the state court judgment was nondischargable based on principles of collateral estoppel. Miller appealed the judgment of the District Court. The Fifth Circuit reversed and remanded, holding that the jury's findings in the state court did not speak to whether Miller acted with fraudulent intent for purposes of § 523(a)(4) or whether an objective probability of injury existed for purposes of § 523(a)(6).

The Fifth Circuit surmised,

> If the subjective standard alone were the standard, issue preclusion would give Miller victory because the jury found that he did not act with "malice," defined by the court to include "evil motive."

Matter of Miller, 156 F.3d 598, 604 (5th Cir. 1998). Contrary to the statement made by Abrams in its conditional cross-petition, the Fifth Circuit noted,

> Since the jury's findings in the state court did not speak to whether Miller acted with fraudulent intent or the objective probability of injury from Miller's tortious acts, the parties are free to try this issue for the first time.

Miller, 156 F.3d at 606. Simply put, as to the question of whether Miller acted with a subjective motive to cause harm, the Fifth Circuit found that collateral estoppel would apply in Miller's favor. This issue will not be retried unless the Court decides otherwise.

REASONS WHY THE CROSS-PETITION SHOULD BE DENIED

I.

THE COURT'S PRIOR DECISIONS ARE CONTROLLING.

The Court has previously explained that not every tort judgment for conversion is exempt from discharge. *Kawaauhau v. Geiger*, __ U.S. __, 118 S. Ct. 974, 977, 140 L. Ed. 2d 90 (1998) citing *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 55 S. Ct. 151, 977, 79 L. Ed. 2d 393 (1934).

II.

THE FIFTH CIRCUIT FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUE.

In accord with the Court's prior decision in *Kawaauhau*, the Fifth Circuit adheres to rule of law that a claim for the tort of conversion does not necessarily involve an intentional injury. *State of Texas v. Walker*, 142 F.3d 813, 823 (5th Cir. 1998). In the instant case, the Fifth Circuit fully considered the issue and correctly concluded, "Merely because a tort is classified as intentional does not mean that any injury caused by the tortfeasor is willful." *Miller*, 156 F.3d at 604.

III.

ONLY QUESTIONS OF EVIDENCE AND FACTUAL FINDINGS ARE INVOLVED.

The jury made a factual finding that Miller did not act with "malice" which the trial court defined to include "evil motive." *Miller*, 156 F.3d at 604. Based on this factual finding, the Fifth Circuit correctly concluded the jury had found that Miller did not act with a subjective intent to cause injury to Abrams. *Id.* The jury also found that Miller had not breached any fiduciary duties owed to Abrams. *Miller*, 156 F.3d at 601.

Miller has argued *ab initio* that his level of culpability does not exceed that of simple negligence. At the trial before the Bankruptcy Court, Miller intends to present evidence to show he did not act with a fraudulent intent or with knowledge of a substantial certainty that Abrams would suffer any injury as a result of his actions. The jury's refusal to find that Miller acted with malice toward Abrams coupled with the failure to find that Miller breached any fiduciary duties owed to Abrams supports this position. The Court has previously held that a debt which arises from a negligently inflicted injury does not fall within the ambit of 11 U.S.C. § 523(a)(6). *Kawaauhau*, __ U.S. at __, 118 S. Ct. at 978.

IV.

THE DECISION BELOW FOLLOWS AN UNBROKEN LINE OF AUTHORITY.

Abrams would have the Court carve out an exception to the rule of law that a trier of fact is required to examine a defendant's scienter or specific intent prior to a finding of either larceny or embezzlement. The proposed exception would apply

only in cases involving misappropriation of trade secrets or proprietary information. Felonious or fraudulent intent, however, is a prerequisite for each of these offenses. Embezzlement differs from larceny only in that the *original* taking was lawful. *See generally Moore v. United States*, 160 U.S. 268, 269, 16 S. Ct. 294, 295, 40 L. Ed. 422 (1885) and its progeny. Absent intent to defraud, a defendant's appropriation does not rise to the level of embezzlement. At the trial before the Bankruptcy Court, Miller intends to present evidence to show he held an honest, but mistaken belief that he had a right to disclose the subject information to Balfour Beatty. This evidence will negate any inference of fraudulent intent.

CONCLUSION

For all of the foregoing reasons, Abrams' conditional cross-petition for writ of certiorari should be denied.

Respectfully submitted,

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